UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34

THE FOUNTAINS SENIOR PROPERTIES OF NEW YORK, INC., D/B/A THE FOUNTAINS AT MILLBROOK Employer [1] and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 200-D, AFL-CIO Petitioner	Case No. 34-RC-1826

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,[2] the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

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[1] The Employer's name is corrected to conform to the stipulation in the record.

[2] The Employer's post-hearing Motions to correct the transcript are hereby granted.

4. For the reasons noted below, I find that a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

The Petitioner seeks to represent a unit of service and maintenance employees employed by the Employer at its senior housing retirement community in Millbrook, New York. In its post-hearing brief the Employer moved to dismiss the petition on the grounds that the unit is expanding and that, as of the close of the hearing, its employee compliment was neither substantial nor representative as to warrant an immediate election.

The Employer's Millbrook operations are situated on a 200-acre tract of land. It currently consist of a main building which contains 78 residential apartments, a dining room and a kitchen. Attached to the main building is a former school building which houses all of the Employer's common areas including a country store, an auditorium, an art room, a library, a card room, and a billiards room. Also located on the Millbrook property are 44 residential cottages, a building containing 9 residential apartments, a 2-story house containing 5 residential apartments, a recreation building which includes a swimming pool, a former firehouse which has been converted into 3 independent apartments, a maintenance shop and a water treatment plant.

No nursing care is currently provided at the Millbrook facilities, and a New York State license is not required for its operation. However, the Employer is in the process of completing the construction of a new addition to the main building where it will provide assisted living with nursing care that will require a New York State license. More specifically, the record establishes that in July 1999, the Employer commenced construction of a 29,000 square foot addition to the main building that will include 34 residential apartments, a dining room and a living room. Although the Employer had not obtained the necessary state license as of the close of the hearing, the record indicates that that occupancy is expected to begin on July 17, 2000.

As more fully discussed below, the record reveals that, as of the close of the hearing, the appropriate unit was composed of approximately 51 employees in the

following 12 job classifications: groundskeeper, maintenance, housekeeper, laundry assistant/associate, driver, community life assistant, receptionist, chef/cook, dishwasher, food server, county store attendant, and janitor/custodian. The record further reveals that, in conjunction with opening the new addition, the Employer is advertising for, and plans to hire, approximately 10 more unit employees (viz., 5 food service employees, 2 housekeepers, 1 maintenance employee, 1 part time driver, and 1 part time community life assistant) and 7 nurse's aides. Finally, although it had not filled these positions as of the close of the hearing on June 6, 2000, the evidence indicates that the Employer was "hoping" to interview and make offers to job applicants during June 19, 20, and 21, 2000, so that they could begin work on July 5, 2000.

As the Employer correctly notes, it is well established that the Board will not direct an election in an expanding unit unless it can be shown that "the employees at the time of the holding of an election constitute a substantial and representative segment of the complement to be employed within the foreseeable future." *General Cable Corporation*, 173 NLRM 251 (1969). Contrary to the Employer however, I am satisfied that the employee complement as of the close of the hearing was substantial and representative of the ultimate employee complement to direct an immediate election.[3] See e.g. *Witteman Steel Mills, Inc.*, 253 NLRB 320 (1980); *General Cable Corporation,* supra. Therefore, the Employer's motion to dismiss the petition is hereby denied.

5. As previously indicated the Petitioner seeks to represent a unit of service and maintenance employees. Included in that unit are groundskeepers, maintenance employees, housekeepers, laundry assistants and associates, community life assistants, chefs and cooks, dishwashers, food servers, and janitors and custodians. The Employer does not dispute the inclusion of any of these individuals, but it would add drivers, receptionists, concierge employees, the marketing assistant, the country store attendant and the future nurse's aids. The Petitioner's positions regarding these employees are set forth below.

[3] In this regard, I note that even with the inclusion of the nurses aides, at the close of the hearing the Employer employed 51 of a projected 68 unit employees in 12 of 13 job classifications.

Overall day-to-day supervision of the Millbrook facilities is vested in Executive Director Deborah L. Jones. Reporting directly to Jones are 7 department heads: the Business Manager, the Director of Housekeeping, the Director of Health Services, the Director of Maintenance, the Community Life Director, the Sales/Marketing Director, and the Director of Food Services.[4]

The Employer employs 8 drivers. All are hourly paid. At least 3 work on a regular basis, between 20 and 40 hours a week. At least 4 others are "on call." With regard to their on call drivers the number of hours or the frequency of their work is not reflected in the record. The record reveals that all drivers work in the same department as the community life assistant, and that their duties consist of providing on-campus transportation for residents and off-campus transportation to the train station in inclement weather for employees. At the hearing the Petitioner acknowledged that the drivers "have a pattern of work in concert with the other work force." However, it raised a question, which it apparently abandoned in its post-hearing brief, as to the frequency and regularity of their work.

Based upon the above and the record as a whole I find that the full-time and regular part-time drivers share a sufficient community of interest with the petitioned-for employees to warrant their inclusion in the unit. *Boston Medical Laboratory, Inc.,* 235 NLRB 1271 (1978). With regard to the on-call drivers, there is nothing in the record to suggest that they do not possess the same community of interest as the full-time and regular part-time drivers. I find therefor, in agreement with the Employer, that those on-call drivers who will have averaged at least 4 hours of work per week during the calendar quarter preceding the eligibility date are eligible to vote in the election directed herein. *V.I.P. Movers, Inc.*, 232 NLRB 14, 15 (1977); *Davison-Paxon Co.,* 185 NLRB 21, 23-24 (1970); *Allied Stores of Ohio*, 175 NLRB 966, 969 (1969).

The Employer employs 5 receptionists.[5] The Petitioner would exclude them as office clerical employees. The receptionists are hourly paid and receive the same

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[4] The parties have agreed to exclude the Executive Director and the 7 department heads as managerial employees.

[5] Included in this classification is one employee, Vera Johnson, whose job title is listed as "Administrative Assistant."

benefits as employees in the petitioned-for unit. One works full time. The others work part time during the evenings and on weekends. Although they report to the Business Manager, there is no evidence that they perform traditional business office functions. Rather, they work at the front desk in the main building where their duties include: greeting and directing visitors; answering the phones; receiving and distributing packages; writing maintenance work orders; and relaying information by radio to the drivers, the housekeeper, and maintenance employees.

As the Petitioner correctly notes in its post-hearing brief, the Board will exclude business office clerical employees from service and maintenance units in the health care industry. See *Rhode Island Hospital*, 313 NLRB 343, 359 (1993). However, based upon the above and the record as a whole, I find that the receptionists are not business office clerical employees and I shall, therefore, include them in the unit found appropriate herein. *Lincoln Park Nursing Home*, 318 NLRB 1160, 1164-65 (1995); *Charter Hospital of Orlando South*, 313 NLRB 951 (1994).

The Employer employs 3 concierges. The are hourly paid, but do not work on a full-time basis. They work in the marketing office in the main building with the marketing assistant. The marketing assistant is salaried. Both of these classifications are directly supervised by the Sales/Marketing Director. The marketing assistant gives tours and makes sales to prospective residents and introduces new residents to a concierge. The concierges assist new residents by coordinating their move into the Employer's facilities. At the hearing the Petitioner noted that it did not challenge "the pattern of work" of the concierges, but raised a question, as to their frequency of work. In its post-hearing brief, however, the Petitioner has apparently abandoned its question as to their frequency of work, but argues that the concierges should be excluded as office clerical employees. As for the marketing assistant, the Petitioner would exclude her as lacking a community of interest with unit employees.

Based upon the above and the record as a whole I find that the concierges are essentially office clerical employees and I shall exclude them from the unit found

appropriate herein. *Saint Anthony Center*, 220 NLRB 1009, 1013 (admitting coordinator) (1975). I further find, based upon different supervision, work location and compensation, that the marketing assistant does not possess a sufficient community of interest with unit employees to require her inclusion therein. [6]

The country store attendant is an hourly paid employee who works in the small "convenience store" that the Employer maintains for residents and employees. She reports to the Food Service Director and receives the same benefits as unit employees. At the hearing the Petitioner sought to exclude this individual. No reason was proffered, and its post-hearing brief contains no reference to this issue. Based upon the above and the record as a whole, I find that the country store attendant possesses a sufficient community of interest with unit employees to include her in the unit. *Saint Anthony Center*, 220 NLRB 1009, 1014 (beauty shop operator) (1975).

As previously indicated, the Employer seeks to include in the unit the 7 nurse's aides that it plans to hire to begin work by July 5, 2000. The Petitioner opposes their inclusion on the grounds that they will lack a community of interest with unit employees. The record indicates that the nurse's aides will be compensated on an hourly basis and will be required to wear uniform shirts that will be provided by the Employer. The record further indicates that the nurse's aides need not be certified and that they will be responsible for monitoring residents' medications and assisting residents with such personal care services as bathing and dressing. Finally, the record reveals that the nurse's aides will be supervised by 2 yet to be hired LPNs, whose unit placement is not in issue; and that the LPNs will report to the Director of Programs/Gardens, a stipulated supervisor who is also a nurse.

Although the Employer had not hired any nurse's aides as of the close of the hearing, in expanding unit situations the Board has considered the unit placement of a new classification of employees whose employment is imminent and not speculative.

[6] In its post-hearing brief the Petitioner further contended, for the first time, that the marketing assistant "directs the workforce as a supervisor." The record contains no evidence to support this contention or to otherwise suggest that the marketing assistant is a supervisor within the meaning of the Act.

See *Witteman Steel Mills, Inc.*, supra. Nevertheless, I am reluctant to pass upon the status of employees who have not yet been hired into positions that are new to the Employer's operations. Therefore, I shall leave the determination of this issue, should it be necessary, to a subsequent appropriate proceeding after the new positions have materialized.

Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time service and maintenance employees employed by the Employer at it Millbrook, New York, facilities, including grounds keepers, maintenance employees, housekeepers, laundry assistants and associates, drivers, community life assistants, receptionists, chefs and cooks, dishwashers, food servers, janitors and custodians, and the country store attendant; but excluding, concierges, the marketing assistant, the human resources assistant,[7] the Executive Director, the Business Manager, the Director of Housekeeping, the Director of Health Services, the Director of Maintenance, the Community Life Director, the Sales/Marketing Director, the Director of Food Services, and guards,[8] professional employees, and supervisors [9] as defined in the Act.

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[7] The parties stipulated to exclude Human Resources Assistant Barbara Meaty as a confidential employee.

[8] The Employer, contrary to the Petitioner, would include part time guard Willis White as a "dual function" employee. The record establishes that White spends 60% of his time as a maintenance employee and 40% of his time as a guard. It is well established that, unless the performance of guard duties is minor or incidental, the percentage of time that an employee is required to function as a guard is not controlling. *Rhode Island Hospital* supra, at 347; *Wells Fargo Alarm Services*, 289 NLRB 562 (1988); *A.W.Schlesinger Geriatric Center*, 267 NLRB 1363, (1983). I shall therefore, exclude White from the unit found appropriate herein.

[9] The parties stipulated to the exclusion of Housekeeping Supervisor Paulette Weber, Director of Programs/Gardens Melanie Eades, and Director of Food Services Erin Cimms as supervisors within the meaning of the Act. In addition, the Petitioner, contrary to the Employer would exclude maintenance employee William Albrecht as a statutory supervisor.

The record reveals that Albrecht spends approximately 90% of his time in manual labor performing preventive maintenance. The remaining 10% of his time is pent assisting the Director of Maintenance performing such duties as purchasing plumbing supplies. He has no authority to hire, fire, promote, discipline or direct other employees. He can't assign overtime and any recommendations that he may make are subject to independent review. Although he substitutes for the Director of Maintenance 2 weeks a year when the latter is on vacation, there is no evidence that he possesses or exercises any supervisory authority during that time. Accordingly, based upon the above and the record as a whole I find that the Petitioner has not met its burden of establishing that William Albrecht is a supervisor, and I shall include him in the unit found appropriate herein. *Lincoln Park Nursing Home,* supra, at 1162-63.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notices of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. These eligible employees shall vote whether or not they desire to be represented for collective bargaining purposes by Service Employees International Union, Local 200-D, AFL-CIO.

To ensure that all eligible employees have the opportunity to be informed of the issues in the exercise of their statutory rights to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *NLRB v Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision and Direction of Election, the Employer shall file with the undersigned, an eligibility list containing the *full* names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The undersigned shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional office, 280 Trumbull Street, 21st Floor, Hartford, Connecticut 06103, on or before June 29, 2000. No extension of time to file these lists shall be granted except in extraordinary

circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by July 6, 2000.

Dated at Hartford, Connecticut this 22nd day of June, 2000.

/s/ Peter B. Hoffman
Peter B. Hoffman, Regional Director
Region 34
National Labor Relations Board

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